82-1049

Office-Supreme Court, U.S.
FILED
DEC 20 1982
ALEXANDER L. STEVAS,
CLERK

No.

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

---

HENRY WASHINGTON ERWIN, III,

*Petitioner,*

*v.*

STATE OF TEXAS,

*Respondent.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE TENTH SUPREME JUDICIAL DISTRICT, WACO, TEXAS

---

PAUL E. GARTNER
500 Citizens Tower
Waco, Texas 76701
(817) 754-5456
*Attorney for Petitioner*

JOSEPH (SIB) ABRAHAM, JR.
CHARLES LOUIS ROBERTS
Post Office Box D
El Paso, Texas 79951-0004
(915) 544-7860
*Attorneys for Petitioner*

Washington, D.C. • THIEL PRESS • (202) 638-4521

## QUESTIONS PRESENTED

I. Whether evidence that the Petitioner "[flew] in an uncertified plane, [used] an alias to rent an apartment where the conspirators met, [lied] about his association with [a co-conspirator], and [lied] about his passport" was legally sufficient to convict Petitioner of the offense of conspiring to possess a controlled substance through "fraud, misrepresentation, or deception" (*Indictment,* RI 6; *Texas Penal Code,* Art. 71.02(a)(5).

II. Whether the interpretation given to whether *Texas Penal Code,* Art. 71.02(a)(5) by the Texas Court of Appeals so as to permit conviction of the offense of possession of a controlled substance by fraud, misrepresentation, or deception on evidence showing only that the accused "[flew] in an uncertified plane, [used] an alias to rent an apartment where the conspirators met, [lied] about his association with [a co-conspirator], and [lied] about his passport," is so vague and indefinite as to fall afoul of the United States Constitution.

## TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... i

TABLE OF CONTENTS ..... ii

TABLE OF AUTHORITIES ..... iii

OPINIONS BELOW ..... 2

JURISDICTION ..... 2

CONSTITUTIONAL PROVISIONS AND STATUTORY PROVISIONS INVOLVED ..... 3

STATEMENT OF THE CASE ..... 3

REASONS WHY THE WRIT SHOULD BE GRANTED:

I. Evidence That The Petitioner "[Flew] In An Uncertified Plane, [Used] An Alias To Rent An Apartment Where The Conspirators Met, [Lied] About His Association With [A Co-conspirator], And [Lied] About His Passport" Was Legally Sufficient To Convict Petitioner Of The Offense Of Conspiring To Possess A Controlled Substance Through Fraud, Misrepresentation, Or Deception," (*Indictment*, RI 6; *Texas Penal Code*, Art. 71.02(a)(5) ..... 8

II. The Interpretation Given To Whether *Texas Penal Code*, Art. 71.02(a)(5) By The Texas Court Of Appeals So As To Permit Conviction Of The Offense Of Possession Of A Controlled Substance By Fraud, Misrepresentation, Or Deception On Evidence Showing Only That The Accused "[Flew] In An Uncertified Plane, [Used] An Alias To Rent An Apartment Where The Conspirators Met, [Lied] About His Association With [A Co-conspirator], And [Lied] About His Passport," Is So Vague And Indefinite As To Fall Afoul Of The United States Constitution ..... 15

CONCLUSION AND PRAYER ..... 20

APPENDICES:

A: *Erwin v. State*, No. 10-81-001-CR, Slip Opinion, June 3, 1982 ..... 1a

B: Denial of Petitioner's Petition for Discretionary Review, *Erwin v. State*, No. 565-82, September 22, 1982 ..... 15a

C: Denial of Petitioner's Motion for Rehearing of Petitioner's Petition for Discretionary Review, *Erwin v. State*, No. 565-82, October 20, 1982 ..... 16a

## TABLE OF AUTHORITIES

*Cases:*

*Clark v. State*, 577 S.W.2d 238 (Tex. Cr. App. 1979) ..... 9, 19

*Dunn v. United States*, 442 U.S. 100, 99 S. Ct. 2190, 60 L. Ed. 2d 743 (1979) ..... 16

*Erwin v. State*, No. 10-81-001-CR, Slip Opinion, June 3, 1982 at 8 ..... 2, 6, 17

*Erwin v. State*, No. 565-82 ..... 2

*Ex Parte Holbrook*, 609 S.W.2d 541 (Tex. Cr. App. 1980) ..... 9, 19

*Ex Parte Russell*, 561 S.W.2d 844 ..... 9, 19

*Hynes v. Mayor of Oradell*, 425 U.S. 610, 96 S. Ct. 1755, 48 L. Ed. 2d 243 (1976) ..... 16

*Hill v. State*, 266 P.2d 979 (Okla. 1954) ..... 11

*Lanzetta v. New Jersey*, 306 U.S. 451, 59 S. Ct. 618, 83 L. Ed. 888 (1939) ..... 16

*Mosely v. State*, 299 So. 2d 317 (Alabama) ..... 11

*People v. Nelson*, 225 N.E.2d 320 (Ill. 1967) ..... 11

*Posey v. State*, 545 S.W.2d 162 (Tex. Cr. App. 1977) ..... 9, 19

*Raley v. Ohio*, 360 U.S. 423, 79 S. Ct. 1257, 3 L. Ed. 2d 1344 (1959) ..... 16

*Rejcek v. State*, 545 S.W.2d 164 (Tex. Cr. App. 1977) ..... 9, 19

*State v. Belanger*, 167 A.2d 245 (Conn. 1961) ..... 11

*State v. Espinoza*, 66 So. 2d 323 (La. 1950) ..... 11

*State v. Lee*, 383 P.2d 491 (Wash. 1963) ..... 11

*State v. Livingston*, 469 P.2d 632 (Or. 1965) ..... 11

*Cases, continued:* Page

*State v. Logan*, 83 P.2d 1035 (Nevada) . . . . . 11
*State v. Powell*, 321 P.2d 333 (Or. 1958) . . . . . 11
*United States v. Bass*, 490 F.2d 846 n.11 (5th Cir. 1974) . . . . . 12

***Constitution, Statutes and Rules:***

United States Constitution, Amendment IV . . . . . 3
United States Constitution, Amendment XIV . . . . . 3
Supreme Court Rules, Rule 22 . . . . . 2
21 U.S.C. § 843(a)(3) . . . . . 11-12
28 U.S.C. § 1257(3) . . . . . 2
Texas Penal Code, Art. 71.02(a)(5) . . . . . *passim*
V.A.C.S. Art. 4476-15 § 4.09(5) . . . . . *passim*
Texas Code of Criminal Procedure, Art. 42.14 § 3e(a)(3) . . . . . 13, 21

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

---

HENRY WASHINGTON ERWIN, III,

*Petitioner,*

*v.*

STATE OF TEXAS,

*Respondent.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE TENTH SUPREME JUDICIAL DISTRICT, WACO, TEXAS

---

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, HENRY WASHINGTON ERWIN, III, Appellant in the court below, respectfully prays that a writ of certiorari issue to review the judgment of the Texas Court of Appeals for the Tenth Supreme Judicial District, Waco, Texas, entered in the above case on June 3, 1982.

That decision affirmed the conviction and judgment of Petitioner entered by the 54th District Court for McLennan County, Waco, Texas.

## OPINIONS BELOW

The opinion of the Texas Court of Appeals for the Tenth Supreme Judicial District, Waco, Texas from which Henry Washington Erwin, III now petitions for a writ of certiorari, *Erwin v. State*, No. 10-81-001-CR (Tex. Ct. App. June 3, 1982), was issued as a non-published memorandum opinion and is reproduced herein as Appendix "A," *infra*. The denial of the Petitioner's *Petition for Discretionary Review* to the Texas Court of Criminal Appeals (*Erwin v. State*, No. 565-82 September 22, 1982), is not published and is reproduced herein as Appendix "B." The denial of the Petitioner's *Motion for Rehearing* of his Petition for Discretionary Review (*Erwin v. State*, No. 565-82 October 20, 1982), is not published and is reproduced herein as Appendix "C."

## JURISDICTION

The Judgment of the Texas Court of Appeals affirming the conviction of Petitioner was entered on June 3, 1982. The Texas Court of Criminal Appeals denied Petitioner's Petition for Discretionary Review on September 22, 1982. A timely Motion for Rehearing was filed by Petitioner and denied by the Texas Court of Criminal Appeals on October 20, 1982. This Petition is timely filed within sixty (60) days of the denial of rehearing under the *Supreme Court Rules*, Rule 22. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

## CONSTITUTIONAL PROVISIONS AND STATUTORY PROVISIONS INVOLVED

1. *U.S. Constitution,* Amendment IV provides in pertinent part that:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

2. *U.S. Constitution,* Amendment XIV provides in pertinent part that:

> No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; . . . .

3. *Texas Penal Code,* Art. 71.02(a)(5) provides:

> (a) A person commits an offense, if with the intent to establish, maintain, or participate in a combination or in the profits of a combination, he commits or conspires to commit one or more of the following:
>
> . . . .
>
> (5) . . . unlawful possession of a controlled substance or dangerous drug through forgery, fraud, misrepresentation or deception;

## STATEMENT OF THE CASE

This is a Petition for a Writ of Certioari from an opinion of the Texas Court of Appeals (App. "A") affirming the previous judgment and conviction of Petitioner of the offense of organized criminal activity, *Texas Penal Code,* Art. 71.02(a)(5) entered against Petitioner in the 54th District Court of McLennan County, Texas.

The Petitioner was indicted in April 21, 1981 as follows:

> [T]hat HENRY WASHINGTON ERWIN, III * * * on or about the 27th day of May A.D. 1980, * * * with intent to establish, maintain and participate in a combination and the profits of a combination which consisted of at least five of the following people * * * did then and there knowingly conspire with one or more persons in said combination to engage in conduct which would constitute the offense of the illegal possession of a controlled substance, namely a useable quantity of marijuana, over the amount of four (4) ounces, by fraud, misrepresentation and deception.

The indictment relied on Texas Penal Statute Art. 71.02(a)(5) which provided: "(a) A person commits an offense, if with the intent to establish, maintain, or participate in a combination or in the profits of a combination, he commits or conspires to commit one or more of the following: . . . (5) . . . unlawful possession of a controlled substance or dangerous drug through forgery, fraud, misrepresentation or deception."

At trial, the evidence generally demonstrated that a criminal combination or conspiracy which included the Petitioner as a member existed and that such combination or conspiracy was formed for the purpose of importing marijuana into the United States (RII 65). Specifically, the scheme involved the Petitioner and another co-conspirator flying a large amount of marijuana from Colombia to a small airport near Waco, Texas (RII 106-107). According to Government witnesses, the plan was abandoned when the aircraft utilized by the conspiracy crashed and burned in Colombia (RII 106-107). Prior to the crash, the state showed several meetings of conspirators (RII 46-59), some of which occurred in a room that the Appellant rented under an

alias (RIV 453). The state also showed that the plane, a "Convair 440," was not safety certified. Following the plane crash in Colombia, the evidence showed that the Petitioner reentered the United States at Miami, Florida after arriving from Colombia (RIV 539-543, 546-549). At that time, the Petitioner claimed that his passport was lost or stolen which was untrue (RIV 545-549), and that he did not know a fellow conspirator which was also untrue (RV 549). Following this trial, the Petitioner was convicted under the above indictment (RI 6), and sentenced to five (5) years confinement and a $5,000.00 fine (RV 707).

Prior to his conviction, the Petitioner complained of lack of proof that he conspired "to engage in conduct which would constitute the offense of . . . possession of a controlled substance . . . *by fraud, misrepresentation and deception* . . ." (emphasis in original), *Defendant's Motion for Instructed Verdict* (RI 75). That Motion alleged that:

> The indictment therefore essentially alleges that the Defendant conspired to possess marijuana through fraud, misrepresentation and deception. The proof, if it shows anything at all, merely shows that the Defendant conspired to possess marijuana. There is no evidence which shows that the Defendant conspired to possess the controlled substance through any act of fraud, by misrepresentation, or through deception.

*Motion, ibid.*

After the overruling of his Motion and his subsequent conviction, the Petitioner appealed to the Texas Court of Appeals for the Tenth Supreme Judicial District, complaining:

VII.

THE TRIAL COURT ERRED IN HOLDING THAT THERE WAS SUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION WHERE THE EVIDENCE OF THE STATE DID NOT PROVE THE ALLEGATION IN THE INDICTMENT THAT THE APPELLANT: * * * DID THEN AND THERE KNOWINGLY CONSPIRE WITH ONE OR MORE PERSONS IN SAID COMBINATION TO ENGAGE IN CONDUCT WHICH WOULD CONSTITUTE THE OFFENSE OF THE ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE, NAMELY A USEABLE QUANTITY OF MARIJUANA, OVER THE AMOUNT OF FOUR (4) OUNCES, *BY FRAUD, MISREPRESENTATION AND DECEPTION,* NAMELY MARIJUANA INTO THE UNITED STATES OF AMERICA BY AIRPLANE.

App. *Brief,* at 2, 38 (emphasis in original).

The Texas Court of Appeals overruled this ground of error, holding:

> In his seventh ground of error, Appellant challenges sufficiency of the evidence to prove Appellant acted by "fraud, misrepresentation and deception." The following are illustrative of Appellant's acts of fraud, misrepresentation and deception and were sufficient to sustain the conviction: flying in an uncertified plane, using an alias to rent the apartment where the conspirators met, lying about his association with Baldi and lying about his passport.

*Erwin v. State,* No. 10-81-001-CR, Slip Opinion June 3, 1982, at 8; App. "A."

Following the affirmance of his conviction by the Texas Court of Appeals on June 3, 1982 (*Erwin, supra*; App. "A"), the Petitioner unsuccessfully sought a hearing of his cause before the Texas Court of Criminal Appeals in a *Petition for Discretionary Review* and in a *Motion*

*for Rehearing of Petition for Discretionary Review* in which he argued that the evidence was legally insufficient to show that he conspired to possess a controlled substance through fraud, deception, etc., or, in the alternative, the statute as interpreted by the Court of Appeals was unconstitutionally vague and ambiguous. The *Petition* and *Motion for Rehearing* were both denied.

There are no factual issues in this case. The Petitioner concedes that he flew "in an uncertified plane"; used "an alias to rent the apartment where the conspirators met"; and "lied about his association with Baldi and about his passport," *Erwin*, at 8; App. "A." The Petitioner does not concede that this evidence shows a conspiracy to possess a controlled substance through fraud, etc., as these statutory terms have been interpreted by Texas Courts, other state Courts, and by Federal Courts and as such terms must be interpreted to escape the complaint that they are unconstitutionally vague and indefinite.

## REASONS WHY THE WRIT SHOULD BE GRANTED

### I.

**EVIDENCE THAT THE PETITIONER "[FLEW] IN AN UNCERTIFIED PLANE, [USED] AN ALIAS TO RENT AN APARTMENT WHERE THE CONSPIRATORS MET, [LIED] ABOUT HIS ASSOCIATION WITH [A CO-CONSPIRATOR], AND [LIED] ABOUT HIS PASSPORT" WAS LEGALLY SUFFICIENT TO CONVICT PETITIONER OF THE OFFENSE OF CONSPIRING TO POSSESS A CONTROLLED SUBSTANCE THROUGH "FRAUD, MISREPRESENTATION, OR DECEPTION" (*INDICTMENT*, RI 6; *TEXAS PENAL CODE*, ART. 71.02(a)(5)).**

**A. The importance of this case arises from the fact that the statutory language which was given a radical and novel interpretation by the Texas Court of Appeals is common to virtually every state and federal jurisdiction.**

1. *The Texas Statute and the Previous Case Law Interpreting It.*

The Petitioner's Indictment read: "Unlawful possession of a controlled substance . . . through . . . fraud, misrepresentation or deception." *Indictment*, RI 6. The Petitioner was convicted of violating *Texas Penal Code*, Art. 71.02(a)(5) which reads:

> (a) A person commits an offense if, with the intent to establish, maintain, or participate in a combination or in the profits of a combination, he commits or conspired to commit one or more of the following:
>
> . . . .

> (5) unlawful possession of a controlled substance . . . through forgery, fraud, misrepresentation, or deception;

The wording of this Texas statute is itself patterned after the Texas Controlled Substance Act, V.A.C.S. Art. 4476(a)(5).

> Sec. 4.09. (a) It is unlawful for any person knowingly or intentionally:
>
> . . . .
>
> (5) to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge;

All reported appellate Texas cases which deal with this statutory language have been cases where the Defendant was charged with utilizing a false prescription, giving deceiving information, utilizing an alias, forging a prescription, etc., *to a physician, pharmacist, or the like.* In no case were the facts reported so as to give even an indication that the statute could be applied to conduct such as was present in this case, for example: giving a false name to an apartment manager, lying to a customs inspector about one's passport and associations, or flying in a plane that was not "safety" certified. *See Posey v. State,* 545 S.W.2d 162 (Tex. Cr. App. 1977); *Rejcek v. State,* 545 S.W.2d 164 (Tex. Cr. App. 1977); *Ex Parte Russell,* 561 S.W.2d 844 (Tex. Cr. App. 1978); *Clark v. State,* 577 S.W.2d 238 (Tex. Cr. App. 1979); *Ex Parte Holbrook,* 609 S.W.2d 541 (Tex. Cr. App. 1980). *See also* 4 Branch's *Tex. Annot. Penal Stats.* § 4.09 at pp. 268-272; 40 Tex. Jur. 2d Rev. Pt. 2 § 49.

### 2. *Statutory Language and Case Law in Other State Jurisdictions.*

As pointed out previously, the magnitude of the error of interpretation made by the Texas Court is magnified by the fact that the language is common to controlled substance law in all jurisdictions. The reason behind the identical language being present in many jurisdictions and near-identical language being present in virtually all jurisdictions is that this statutory language had the same genesis, history, purpose, etc. The earlier *Uniform Narcotic Drug Act* which was passed by most state jurisdictions read:

> (1) No person shall obtain or attempt to obtain a narcotic drug, or procure or attempt to procure the administration of a narcotic drug, (a) by fraud, deceit or misrepresentation, or subterfuge; or (b) by the forgery or alteration of a prescription or of any written order; or (c) by the concealment of a material fact; or (d) by the use of a false name or the giving of a false address.

*Uniform Narcotic Drug Act*, § 17.

*See* "Producing Narcotic–Fraud and Deceit," 25 A.L.R. 3d 1118 §§ 1 and 2. This provision was then modified slightly and then inserted into the Uniform Controlled Substances Act, 25 Am. Jur. 2d § 27.5 which is common to virtually every state jurisdiction. Section 403(a)(3) of the Uniform Controlled Substances Act makes it unlawful for "any person knowingly or intentionally . . . to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception or subterfuge." *Compare* V.A.C.S. Art. 4476-15, § 4.09(5); Texas Penal Code, Art. 71.02(a)(5). Throughout the entire history of the acts in question, this language has never been utilized to reach the conduct demonstrated

in this case. The various commentators have indicated what the interpretation and application have always been:

> Attempting to obtain a narcotic drug by fraud, or concealment of a material fact, or by the use of a false name or address, is prohibited by the statute, as is the uttering of a false or forged prescription, the affixing of a false or forged label to a package containing narcotics, and the making of a false statement in any prescription, order, report, or record required by the act.

25 Am. Jur. 2d 297 § 20.

The history of the actual use of this language has been uniform over the years in all reported appellate cases, for example: *State v. Logan*, 83 P.2d 1035 (Nevada), fraudulent prescription; *State v. Belanger*, 167 A.2d 245 (Conn. 1961), falsely complaining of pains to physician and concealing addiction; *People v. Nelson*, 225 N.E.2d 820 (Ill. 1967), obtaining multiple refills by deceit and concealment; *State v. Espinoza*, 66 So. 2d 323 (La. 1950), forged prescription; *Hill v. State*, 266 P.2d 979 (Okla. 1954); *Mosely v. State*, 299 So. 2d 317 (Alabama), fraudulent call from physician; *State v. Livingston*, 469 P.2d 632 (Or. 1965), untruthfulness or nondisclosure in obtaining drugs from pharmacy; *State v. Lee*, 382 P.2d 491 (Wash. 1963), false name given to physician and/or pharmacy; *State v. Powell*, 321 P.2d 333 (Or. 1958).

### 3. *Federal Statutes and Case Law.*

The only reported Federal appellate case dealing with similar language interpreted the Federal statutory language (21 U.S.C. § 843(a)(3)) as follows:

> 21 U.S.C. § 843(a)(3) makes it unlawful "to acquire or obtain possession . . . *by* misrepresen-

> tation, fraud, . . . , deception, or subterfuge." (Emphasis added.) See footnote 1, *supra.* The statute does not proscribe the mere making of a false statement or representation, or the making of a false statement or representation with an intent to influence another's action but without actual influence. The statute explicitly includes an element of causation.

*United States v. Bass,* 490 F.2d 846, 857, n.11 (5th Cir. 1974).

The *Bass* case like those cases in the state jurisdictions cited was a prosecution based on attempting to obtain a controlled substance by forged prescription from a pharmacist, *Bass,* 490 F.2d at 846-847.

**B. Aside from legal precedent, the interpretation given the statutory language by the Texas Court of Appeals defies logic and common sense.**

The fact that the Petitioner used an uncertified plane and used a fake name while renting an apartment which was used as a meeting place, *Opinion,* at 8, were not deception *by* or *through* which he obtained the marijuana. For example, to construe the statutory language this way would apply the identical language of V.A.C.S. 4476-15 § 4.09 to a person who used a false driver's license *to drive to a pharmacy* and did not use the false license for any purpose other than that. There was never any evidence that the conspirators gave a false name to the actual drug suppliers in Colombia; however, Counsel doubts that such conduct would fall under the statutory language anyway. Furthermore, the Petitioner's lies about alleged co-conspirator Baldi and about his passport, *Opinion,* at 8, occurred after the plane carrying the

marijuana had crashed (RIV 546-549). It was certainly not conduct *by* or *through* which the marijuana was obtained, if such conduct falls under the statutory language at all.

### C. The merits of the cause indicate that the Defendant was convicted of a crime that he simply did not commit.

The State of Texas was not drawn into using that statutory language by lack of alternatives. The State of Texas *could have* indicted the Petitioner properly, and perhaps convicted him of an offense aside from a conspiracy to possess "a controlled substance . . . through forgery, fraud, etc." *Texas Penal Code*, Art. 71.02(a)(5) also would allow indictment and conviction of a person who is engaged in a conspiracy involving the "unlawful . . . delivery, dispensation, or distribution of a controlled substance. . . ." The Texas Controlled Substances Act, V.A.C.S. Art. 4476-15, also provides numerous opportunities for possible charges. The only advantage of *Texas Penal Code*, Art. 7102 is that certain forms of probation are restricted, Texas Code of Criminal Procedure, Art. 42.14 § 3e(a)(3).

So we have an accused who apparently committed a crime and is now convicted, but the rub is that he did not commit the crime of which he is convicted. In our headlong rush to strengthen the forces of law and order, the labor of matching criminals with the crimes they actually committed could perhaps be considered an unnecessary burden on law enforcement. For if the individual is truly guilty how can he justly complain or society justly complain about his conviction of a crime even if it were not committed by him? The problem with this approach is that it *totally* replaces a respect for

law with merely a respect for conviction and punishment. This moves our criminal jurisprudence in a retrograde direction back to some period antedating written law. After all, there was always conviction and punishment even without the benefit of the clarity and definition provided by the law. And that is all we have here, mere conviction and punishment instead of conviction and punishment under law.

If this Court has rejected the concept that criminals should be convicted of crimes they did commit as against crimes they did not commit as an outmoded, self-indulgent example of liberal jurisprudence (which it is not), then certiorari should properly be denied. If this Court feels that this case sets a dangerous precedent in seriously tampering with statutory language which is common to the entire nation as well as evidencing a lack of interest in matching crimes to the accused, then certiorari should be granted.

### D. Summary.

In summary, the statutory language found in V.T.C.A. Penal Code, Section 71.02(a)(5) "possession . . . through . . . fraud, misrepresentation, or deception" and its companion statute in the Controlled Substances Act, V.A.C.S. Art. 4476-15 § 4.09(5) has been applied for a reasonable length of time and in many diverse jurisdictions. This language has never been applied in any reported case in Texas, nor in any other State, nor in the Federal Courts to a factual situation even remotely similar to that we have here. Such conduct of an alleged co-conspirator using an alias during an alleged illicit marijuana smuggling venture simply does not fall under the scope of the language above. Additionally, even if this statutory language were applied to such conduct in

a radical and novel redefinition of the statutory language, it still would not apply to the facts in this case because the deceptions listed in the opinion of the Court of Appeals were not means by which or through which marijuana was possessed. For this reason, the evidence introduced against the Petitioner was insufficient to prove he conspired to possess marijuana "by fraud, misrepresentation and deception," and thus he must be accorded a belated judgment of acquittal. Failure to do so would surely tend to undermine public respect for the written Criminal Law which governs so much of our lives.

## II.

**THE INTERPRETATION GIVEN TO WHETHER *TEXAS PENAL CODE*, ART. 71.02(a)(5) BY THE TEXAS COURT OF APPEALS SO AS TO PERMIT CONVICTION OF THE OFFENSE OF POSSESSION OF A CONTROLLED SUBSTANCE BY FRAUD, MISREPRESENTATION, OR DECEPTION ON EVIDENCE SHOWING ONLY THAT THE ACCUSED "[FLEW] IN AN UNCERTIFIED PLANE, [USED] AN ALIAS TO RENT AN APARTMENT WHERE THE CONSPIRATORS MET, [LIED] ABOUT HIS ASSOCIATION WITH [A CO-CONSPIRATOR], AND [LIED] ABOUT HIS PASSPORT," IS SO VAGUE AND INDEFINITE AS TO FALL AFOUL OF THE UNITED STATES CONSTITUTION.**

### A. Indefinite and vague language in general.

If the interpretation of the statutory language by the Texas Court of Appeals is correct and proper, if the acts of using an alias, flying in an uncertified plane, etc., constitute possession of a controlled substance through or by fraud, misrepresentation, etc., then the statutory language falls afoul of the due process guarantees of the Fifth and Fourteenth Amendments to the United

States Constitution. Such constitutional provisions prohibit both the Federal and State Legislative bodies from passing penal laws which are so vague and indefinite as to fail to give proper notice of what conduct is prohibited.

> A State may not issue commands to its citizens, under criminal sanctions, in language so vague and undefined as to afford no fair warning of what conduct might transgress them.

*Raley v. Ohio*, 360 U.S.C. 423, 438, 79 S. Ct. 1257, 3 L. Ed. 2d 1344 (1959).

As Chief Justice Burger recently pointed out:

> As a matter of due process, "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *Lanzetta v. New Jersey*, 306 U.S. 451, 453, 59 S. Ct. 618, 83 L. Ed. 888 (1939).

*Hynes v. Mayor of Oradell*, 425 U.S. 610, 620, 96 S. Ct. 1755, 48 L. Ed. 2d 243 (1976).

This prohibition against vague and indefinite criminal statutes includes a policy in favor of lenity especially in legislation creating new crimes:

> [T]his Court's long-established practice of resolving questions concerning the ambit of a criminal statute in favor of lenity . . . reflects not merely a convenient maxim of statutory construction. Rather, it is rooted in fundamental principles of due process, which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited.

*Dunn v. United States*, 442 U.S. 100, 112, 99 S. Ct. 2190, 60 L. Ed. 2d 743 (1979).

**B. The indefiniteness of the specific statute as interpreted by the Texas Court of Appeals.**

When the Texas Court of Appeals expanded the meaning of the possession of a controlled substance through fraud, forgery, misrepresentation, deception provision to include any covert act related to a controlled substance conspiracy and gave examples of such covert activities which would violate the statutory language: flying in an uncertified plane, using an alias to rent the apartment where the conspirators met, lying about his association with Baldi and lying about his passport, *Erwin v. State*, No. 10-81-001-CR, Slip Opinion June 3, 1982, at 8, it opened the door to a myriad of possible applications of the statutory language, including:

> 1. *Any controlled substance transaction in which the participant or participants are less than open about their status as controlled substance possessors or distributors.*

Since controlled substances are generally illegal to possess or distribute, most violators of the law tend to travel and act covertly. Utilizing the interpretation given the language by the Court below, the State could add another count or counts to every controlled substances indictment alleging with some justification that misrepresentation or deception was involved. For instance, the state could add at least one count (two in a conspiracy situation), in any case involving:

(a) Placing or intending to place a controlled substance in an "innocent" container like luggage;

(b) Placing a controlled substance in a container marked as a container of other substances;

(c) Secreting a controlled substance in one's clothing;

(d) Using an assumed name or an alias while possessing a controlled substance;

(e) Using an assumed name or refusing to give one's proper name in a controlled substance transaction;

(f) Using an assumed name to rent an apartment or hotel room where controlled substances are possessed or even discussed;

(g) During a controlled substance conspiracy, claiming to law enforcement officers or anyone that one did not know another conspirator;

(h) After the failure of a controlled substance conspiracy, claiming to law enforcement officers or anyone that one did not know another conspirator;

(i) Claiming that one had lost his visa or passport after returning from a successful attempt to possess a controlled substance;

(j) Claiming that one had lost his visa or passport after returning from an unsuccessful attempt to possess a controlled substance;

(k) Driving a vehicle with an expired driver's license or no license, expired safety inspection sticker or no sticker, expired registration or no registration while carrying a controlled substance, discussing the possession of a controlled substance, or returning from a successful or an unsuccessful attempt to possess a controlled substance;

(*l*) Wearing attire or otherwise concealing one's appearance or identity while possessing, attempting to possess, or discussing the possession of controlled substances;

(m) Using a business as a cover for controlled substance discussions or transactions; and

(n) Et cetera.[1]

2. *Since the possession of a controlled substance accomplished through obtaining such substance from a lawful supplier has already been interpreted as being part of the "possession . . . through . . . misrepresentation" phraseology, the dropping of the requirement that the possession be accomplished strictly through or by the misrepresentation opens the statutory door even further.*

This interpretation has already been utilized by the Texas Courts which have applied this identical language to cases where the Defendant uses "misrepresentation," etc., to obtain a controlled substance from an otherwise legitimate source, such as a pharmacy, etc., *Posey, supra*; *Rejcek, supra*; *Ex Parte Russell, supra*; *Clark, supra*; *Ex Parte Holbrook, supra.* For example:

(a) Driving to pick up an otherwise legitimate prescription with an expired driver's license, a fraudulent driver's license, a driver's license issued to another;

(b) Possessing a legitimately prescribed controlled substance in a hotel room or apartment rented under an alias;

(c) Discussing the legitimate possession of a controlled substance by prescription in a hotel room or apartment rented under an alias;

(d) Et cetera.

---

[1] As this Court will note, the actual acts upon which the Court of Appeals relied are included above and actually appear even less justifiable than some other examples.

Again it is the elimination of the strict connection of the "fraud, misrepresentation, etc." with the obtaining of possession of the controlled substance that pushes the statute into the void of ambiguity, vagueness, and indefiniteness.

### C. Summary.

In summary, the interpretation of the Texas Court of Appeals which allows mere covert acts unrelated to the actual obtaining of possession of a controlled substance to suffice for obtaining a controlled substance by misrepresentation, deception, etc., that make these examples and the examples that this Court might imagine possible. There is no reason for this interpretation save allowing the State the convenience of convicting this Defendant of the crime of which he is indicted regardless of the bizarre effect on the original statute. The Texas Court of Appeals probably never saw what would happen to the statute generally if this conviction was held. Should this Court find that this novel and radical interpretation is valid, then the Petitioner contends that the statutory language violates the due process clause because it is vague and indefinite to an extreme.

## CONCLUSION AND PRAYER

The Petitioner asks this Court to find that this statutory language which is common to controlled substance law nationwide was erroneously construed by the Texas Court of Appeals or else that this Court find that the tortured interpretation of this cause renders this statute in violation of the due process clauses of the Fifth and Fourteenth Amendments because it becomes incurably vague, ambiguous, and indefinite. Nothing was gained by the State of Texas in this case that would justify

convicting a Defendant of a crime he did not commit or that would justify convicting a Defendant through misconstruing a statute so radically that it loses its claim to validity under the United States Constitution's due process clauses. The only morsel gained by the State for prosecuting under Art. 71.02 as against prosecuting this Petitioner under the Texas Controlled Substances Act, V.A.C.S. 4476-15 was the elimination of the possibility of probation or "shock probation," *Texas Code of Criminal Procedure*, Art. 42.14 § 3e(a)(3). Such a boon to the State does not justify this case.

WHEREFORE, the Petitioner prays that this Court grant a writ of certiorari to the Court of Appeals for the Tenth Supreme Judicial District, Waco, Texas, and thereafter reverse his conviction and enter a judgment of acquittal, or, in the alternative, thereafter dismiss his indictment as being based on a statutory provizion which is unconstitutionally vague and indefinite.

Respectfully submitted,

JOSEPH (SIB) ABRAHAM, JR.
CHARLES LOUIS ROBERTS
Post Office Box D
El Paso, Texas 79951-0004
(915) 544-7860

PAUL E. GARTNER
500 Citizens Tower
Waco, Texas 76701
(817) 754-5456

*Attorneys for Petitioner*

# APPENDIX A

## COURT OF APPEALS
TENTH SUPREME JUDICIAL DISTRICT OF TEXAS
At Waco

---

**No. 10-81-001-CR**
**Trial Court No. 81-179-C**

---

***Henry Washington Erwin, III,***
*Appellant,*

*v.*

***The State of Texas,***
*Appellee.*

---

FROM 54th JUDICIAL DISTRICT COURT,
McLENNAN COUNTY, TEXAS

---

## OPINION

Affirmed June 3, 1982

Appellant was convicted of conspiracy to engage in organized criminal activity and sentenced to not less than two nor more than five years confinement and a $5,000.00 fine.

The Appellant was indicted for the offense set out in TEX. PENAL CODE ANN. § 71.02(a)(5). Essentially, he was charged with conspiring with five or more persons to unlawfully possess marihuana by fraud, misrepresentation and deception. Appellant raises eleven grounds of error, five of which challenge the sufficiency of the evidence to sustain the conviction. Thus, a summary of the evidence is pertinent.

Banks, an aircraft broker, sold a Twin Beech airplane to Alpha K Industries, a sham corporation, through Harris in 1978. Later, Harris told Banks he wanted a larger plane. Banks located a Convair at the end of 1979 in Kissimmee, Florida and bought it at Harris' urging for $95,000.00 from the sheriff in Kissimmee. The plane had been seized by the sheriff because it had been used for running marihuana.

The Convair was not airworthy. Harris told Banks to get the plane ready to fly, that he was sending Stanfield (a/k/a Baldi) as a pilot and sent Banks cash for repairs and fuel. Banks obtained a ferry permit to bring the plane to Waco.

Baldi and Appellant met Banks in Florida, and they flew the Convair to Crestview, Florida, with Appellant piloting. At Crestview a U.S. Customs Agent went on board where Appellant identified himself, but Baldi introduced himself as Stanfield and said he was only a "passenger." No passengers were allowed under the ferry permit. Inside the plane the agent saw a map of northern Colombia. All the seats and normal equipment for such a large aircraft were missing.

A Convair is used almost exclusively for smuggling. A U.S. Customs official testified a legitimate use for a Convair is financially impossible considering the cost of fuel and the expense of operating the large, older aircraft. It would have cost an additional $65,000.00 to $70,000.00 to get the plane certified for legal cargo flights. Such a plane is used for marihuana rather than other drugs because a Convair can carry a great deal of cargo. Cocaine and similar drugs are carried in smaller amounts to minimize the loss in the event of a crash.

Colombia is a major source of marihuana supply for the U.S.

The plane left Crestview with Appellant at the controls. Several witnesses saw the plane land in Waco at the TSTI campus airfield on March 21, 1980. Banks, Baldi and Appellant deplaned.

Thereafter, Harris told Banks the plane was to be used to "run a load" which means hauling marihuana; the plane was to carry about 10,000 pounds of marihuana. The Convair was originally equipped to hold 1,710 gallons of fuel, but Harris ordered additional bladder fuel tanks so that the plane would hold another 1,250 gallons. The tanks cost at least $5,500.00. Harris wanted the Convair to be able to fly 18 hours or about 2800 miles, the approximate distance of a round trip to Colombia. The plane was also modified to carry more oil, and a power booster and a directional radio were installed at Harris' insistence. All the work was paid for in cash. Fuel was bought with cash or cashier's checks and traveler's checks bought with cash.

On April 16 witnesses at the airfield saw Banks arrive in his Cadillac and Baldi and Appellant arrive in a Thrifty rental car. The three men boarded the plane and performed three touch-and-go landings for practice. By this time the ferry permit had expired, and the flights were illegal. A man of northern Colombia was found inside the Thrifty rental car after it was returned.

The Convair was fueled with 1,235 gallons on April 29. The plane left the airfield on May 4 at about 7:45 p.m., and a witness saw a maroon pickup, which had been seen periodically at the airport during the investigation, leaving the airport after the plane was airborne.

The Convair returned to the airfield about 8 a.m. May 5. Appellant and Baldi were piloting the plane. At 6:30 p.m. on that same day, Appellant, Baldi and an unidentified male loaded boxes, green plastic jugs,

briefcases, clothing, camping gear, and backpacks in the Convair. Other men, one identified as Solano, assisted. The Convair requested permission to take off and began to taxi but returned after reporting "mechanical problems." Solano and the unidentified men were watching through binoculars.

Solano and Garcia had rented the Hertz car that Solano had driven to the airfield. Garcia is a resident of Barranquilla, Colombia, which is one of the primary areas from which marihuana is illegally transported to the United States.

On May 6 Banks, acting on Harris' orders, refueled the Convair with 1,232 gallons which cost $2,464.00 and was paid for with cash and a check. On May 7, Banks, Harris, Rogers, Root and Appellant were seen at a convenience store near the airfield in a maroon pickup and a Winnebago. There was testimony that Winnebagos and similar vehicles are used by marihuana smugglers to transport the marihuana after it arrives in the U.S. From May 7-21 Rogers, who had once been seen deplaning the Convair when it returned to the airfield and introduced himself as Jay Roberts, and others were seen traveling to the airport in the maroon pickup and "checking out" the Convair. Some conspirators were also seen in a green pickup during this time.

Appellant, Baldi and others returned to the airfield in the maroon pickup on May 21. The Convair was loaded and the engines were cranked. The witness could not remember whether the plane took off. That evening, the maroon pickup was followed as it went to the Windridge Apartments in Austin where the occupants went inside an apartment. Later, the green pickup arrived, and these men also went into the apartment. The men talked for about an hour.

Baldi, using the name of Stanfield, and Appellant, using "Kyle Rogers" as an alias, had rented the unfurnished apartment in April. The green pickup's registration lists its owner as Alpha K Industries.

The Convair made another illegal flight May 23. It landed at Grayson on May 24, and later that same day arrived in Waco with three crew members including Appellant.

At this time, Harris instructed Banks to get new fuel tanks because the plane had "gotten out over the Gulf" and was unable to transfer fuel. The new fuel pump was installed about May 26.

Appellant and Baldi were seen at the airfield loading items into the Convair May 26. The Cadillac and maroon pickup were also there. The Convair was again fueled with 1,600 gallons. Appellant and Banks then traveled to the Sheraton Hotel in the Cadillac. The maroon pickup and a motor home with Michigan license plates was also there. The same motor home was seen the next day at the airfield.

The Convair departed on its final trip on May 27. That day Appellant and an unknown male entered a room at the Sheraton which was registered to Stanfield (a/k/a Baldi). Later, two men were observed arriving at the airfield in the maroon pickup and taking off in the plane which headed in a southerly direction. The pickup stayed at the airfield until June 7.

About May 30 Harris called Banks and told him the Convair had crashed in Colombia because of overloading and a wet runway; the pilots were "okay" and would be coming in through the southeastern U.S.

Ralph Porras and an unidentified woman arrived at the airfield in his car on June 7th to retrieve the pickup.

Porras had once listed his occupation as a security guard for Alpha K Industries.

Appellant and Baldi were questioned in Miami on June 8 after they came in on the same flight from Colombia. They told the customs agent they did not know each other. Appellant said his passport had been destroyed when his private plane crashed in Colombia even though the passport had been seized in 1979 by an investigator for the Travis County District Attorney's office. Baldi told the agent his passport had been stolen in Colombia. Neither Appellant nor Baldi had luggage.

Banks later met Harris in Austin where Harris, who had not yet paid for the Convair, told Banks the plane would be paid for.

Appellant's first ground of error asserts there is no evidence that the alleged combination was formed with the intent to possess and import marihuana. Viewed in a light most favorable to the verdict, we find there was sufficient evidence to show such intent considering the following: the size of the plane and the expense of operating it; the modifications that were made for long distance flights; the illegal flights; the numbers of people involved; the use of aliases by conspirators; Harris' express declaration to Banks that the plane was to be used to "run a load"; Appellant's denial that he knew Baldi and his lying about his passport; the sham corporation; payments in cash of large sums; the ties to Colombia.

Ground of error two contends there was insufficient evidence to establish the intent to possess and import marihuana because the accomplice testimony of Banks was not corroborated. To test the sufficiency of the corroboration of an accomplice witness, we must eliminate from consideration the evidence of the accomplice

witness and then examine the evidence of the other witnesses to ascertain if it is of incriminating character which tends to connect the defendant with the commission of the offense. If there is such evidence, the corroboration is sufficient; otherwise, it is not. The corroborative testimony need not directly link the accused to the crime or be sufficient in itself to establish guilt. The corroboration need only make the accomplice's testimony more likely than not. *Meyers v. State*, 626 S.W.2d 778, 780 (Ct. Cr. App. 1982); *Carrillo v. State*, 591 S.W.2d 876, 883 (Ct. Cr. App. 1979); TEX. CODE CRIM. PROC. ANN. article 38.14.

Over thirty witnesses testified—almost twenty of which were law enforcement or customs officers. The State introduced eighty-two exhibits, many of which were photographs of those involved in the work on the plane. The testimony of Banks was corroborated in almost every detail except for Harris' express declaration that the plane was to be used to "run a load." The evidence from other witnesses was of an incriminating character, it tended to connect the defendant with the commission of the offense, and it showed Banks' testimony to be more likely than not. Therefore, the evidence was sufficient and ground two is overruled.

Ground three maintains the evidence was insufficient to sustain the conviction because the state did not prove the knowledge of Appellant. A person acts intentionally with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result. TEX. PENAL CODE ANN. § 6.03(a). He acts knowingly with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. He acts

knowingly with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result. § 6.03(b).

Intent can be inferred from the acts, words or conduct of the Appellant. *Romo v. State*, 593 S.W.2d 690, 693 (Ct. Cr. App. 1980). Proof of Appellant's culpable mental state will generally rely on circumstantial evidence. *Heckert v. State*, 612 S.W.2d 549, 550 (Ct. Cr. App. 1981). Evidence which showed Appellant's knowledge includes the following: he made several illegal flights and attempted to make other illegal flights; he saw tanks for extra fuel had been installed; he assisted in installing a new fuel pump; he rented the Austin apartment using an alias; he exited the U.S. in an unairworthy plane; he denied knowing Baldi; he lied about his passport. These and other circumstances were sufficient to show Appellant's knowledge of the purpose of the conspiracy.

Ground of error four asserts there was no proof Appellant performed the overt act set out in the indictment. The indictment alleges Appellant on or about May 27, 1980 "did then and there conspire . . . and did in pursuance of said agreement, perform an overt act, namely fly in an airplane along with Anthony Thomas Baldi." Appellant contends that the State was required to prove the alleged overt act occurred on May 27, 1980. This is not the law.

The date alleged in an indictment "must be some date anterior to the presentment of the indictment, and not so remote that the prosecution of the offense is barred by limitation." TEX. CODE CRIM. PROC. ANN. article 21.02(6). The State is not bound by the date alleged and may prove the offense was committed before,

on or about the date alleged. *Glenn v. State*, 436 S.W.2d 344, 346 (Ct. Cr. App. 1969).

A conspiracy is, by its very nature, an ongoing crime. The crime is committed when the unlawful agreement is entered into and an overt act is performed pursuant to that agreement. *McCann v. State*, 606 S.W.2d 897, 898 (Ct. Cr. App. 1980); *Smith v. State*, 363 S.W.2d 277 (Ct. Cr. App. 1963); TEX. PENAL CODE ANN. § 71.01(b). A completed offense is not an essential element of the conspiracy charged, nor must the overt act be a criminal act. *McCann, supra.*

The overt act alleged, the flying of the plane, was proven to have occurred many times. Therefore, the evidence is sufficient to sustain the conviction.

Ground five contends the evidence was insufficient to prove that at least five persons collaborated in carrying on the criminal activities. TEX. PENAL CODE ANN. § 71.01(a). Appellant concedes many persons were photographed or identified in the plane's vicinity but maintains only Banks, Harris, Baldi and Appellant participated in procuring, repairing and flying the plane.

In addition to the four men named above, several others were involved in loading and maintaining surveillance on the plane and transporting vehicles to and from Austin. The evidence clearly shows that other not only associated with Banks, Harris, Baldi and Appellant but actively participated in the conspiracy. The ground is overruled.

Ground of error six asserts the court erred in denying Appellant's request for an instruction in the charge on the lesser included offense of conspiracy to possess marihuana.

The conspiracy provisions of TEX. PENAL CODE ANN. § 1501 do not apply to violations of the Texas Controlled Substances Act. *Baker v. State*, 547 S.W.2d 627, 628 (Ct. Cr. App. 1977); *Dubry v. State*, 582 S.W.2d 841, 844 (Ct. Cr. App. 1979). Therefore, there is no offense of conspiracy to possess marihuana. The trial court could not have instructed the jury on this "lesser included offense" when it constitutes no offense at all. Ground six is overruled.

In his seventh ground of error, Appellant challenges the sufficiency of the evidence to prove Appellant acted by "fraud, misrepresentation and deception." The following are illustrative of Appellant's acts of fraud, misrepresentation and deception and were sufficient to sustain the conviction: flying in an uncertified plane, using an alias to rent the apartment where the conspirators met, lying about his association with Baldi and lying about his passport.

Ground of error eight asserts error by the cout in overruling Appellant's objection to the prosecutor's argument that he felt sorry for Appellant's mother, but that he felt "more sorry for the rest of the mothers in this country that have to worry about their children, the mothers that have to worry, what's going on in our school." Also, Appellant objected to the prosecutor's argument that the 10,000 pounds of marihuana would not be for the private use of the conspirators but rather for sale. "Who are they going to sell it to? They're going to sell it to anybody who will buy it, at any age. They're going to sell it to pushers, who will, then, in turn, sell it to school children, college students."

In order to be "within the stamp of approval jury arguments need to be within the area of (1) summation of the evidence; (2) reasonable deduction of the evi-

dence; (3) answer to argument of opposing counsel, or (4) a plea for law enforcement." *McClory v. State,* 510 S.W.2d 932, 934 (Ct. Cr. App. 1974); *Alejandro v. State,* 493 S.W.2d 230, 231 (Ct. Cr. App. 1973).

Appellant did not request that the jury be instructed to disregard the argument. Unless an argument is so inflammatory that its prejudicial effect could not have been alleviated by an instruction to disregard, the failure to request such an instruction waives any possible error. *Parr v. State,* 606 S.W.2d 928, 931 (Ct. Cr. App. 1980); *Duran v. State,* 505 S.W.2d 863, 866 (Ct. Cr. App. 1974). Furthermore, the statements were reasonable deductions from the evidence, *Miller v. State,* 566 S.W.2d 614, 619 (Ct. Cr. App. 1978), and valid pleas for law enforcement, *Walthall v. State,* 594 S.W.2d 74, 83 (Ct. Cr. App. 1980).

Appellant's ninth ground contends the court erred in denying Appellant's motion for mistrial after the court sustained his objection and instructed the jury not to consider the prosecutor's remarks regarding handwriting experts. The prosecutor said, "My experience with handwriting examiners are, they want more [than just a signature]. They like a whole alphabet written out, and so forth. And Mr. Segrest requested of the Defense, that that be provided."

Prior to the prosecutor's remark, Appellant's counsel argued the Appellant was not the person who signed the apartment lease with the name "Kyle Rogers." A portion of that argument was as follows:

> I submit to you . . . Ladies and Gentlemen of this Jury, if that was the signature of Hank Erwin, they would have had a handwriting expert to say, yeah, sure the person that signed that is Henry Washington—Hank Washington Erwin—that's who

signed this document? But they didn't choose to do that. And I submit to you, the reason that they didn't is, because it is not his signature.

Appellant's counsel invited the statement of the prosecutor when he stated the State did not bring in a handwriting expert because the signature was not that of the Appellant. *White v. State,* 618 S.W.2d 65, 67 (Ct. Cr. App. 1981); *Garrison v. State,* 528 S.W.2d 837, 840-841 (Ct. Cr. App. 1975). Moreover, any possible error was cured by the trial court's prompt instruction to disregard the statement. *DeBolt v. State,* 604 S.W.2d 164, 169 (1980); *Gholson v. State,* 542 S.W.2d 395, 399 (1976).

The tenth ground of error assails the trial court's action in overruling the motion to quash the indictment. The motion to quash challenged the indictment for lack of specificity in that it did not state, "where this Defendant flew in an airplane, when this Defendant flew in an airplane, and how such flight aided in the conspiracy or what portion of the agreement was carried out through this flight in an airplane." Similarly, the eleventh ground also asserts the motion to quash should have been granted because the indictment did not specifically set out Appelland's role in the conspiracy.

The indictment alleged that Appellant:

> . . . on or about the 27th day of May, A.D. 1980, and before the presentment of this indictment, in the County [McLennan] and State [Texas] aforesaid, . . . with intent to establish, maintain and participate in a combination and the profits of a combination which consisted of at least five of the following people, to wit: . . . which said persons intentionally and knowingly collaborated in carrying on the criminal activity of the illegal and unlawful

possession of a controlled substance, to wit: a useable quantity of marihuana, over the amount of four (4) ounces, did then and there knowingly conspire with one or more person in said combination to engage in conduct which would constitute the offense of the illegal possession of a controlled substance, namely a useable quantity of marihuana, over the amount of four (4) ounces, by fraud, misrepresentation and deception, namely by illegally importing said useable quantity of marihuana into the United States of America by airplane, and the said HENRY WASHINGTON ERWIN, III, did in pursuance of said agreement, perform an overt act, namely fly in an airplane along with Anthony Thomas Baldi, . . . .

The indictment names the place of the offense as McLennan County, Texas. As to the date of the offense, see discussion regarding ground of error four. Everything necessary to be proved was alleged in the indictment. TEX. PENAL CODE ANN. § 71.01; TEX. CODE CRIM. PROC. ANN. article 21.03. The indictment is sufficiently certain to enable Appellant to plead the judgment in bar. TEX. CODE CRIM. PROC. ANN. article 21.04. The allegation of an overt act is in plain and intelligible language. TEX. CODE CRIM. PROC. ANN. article 21.02(7). The language is ordinary and concise and would enable a person of common understanding to know what is meant. It alleges an overt act with sufficient certainty to give appellant notice of the particular offense with which he was charged. The indictment enabled the trial court to pronounce a proper judgment. TEX. CODE CRIM. PROC. ANN. article 21.11. Grounds of error ten and eleven are overruled.

The judgment is affirmed.

GEORGE CHASE
Associate Justice

DO NOT PUBLISH

# COURT OF APPEALS

TENTH SUPREME JUDICIAL DISTRICT

Waco, Texas

I, ROBERT G. WATTS, Clerk of the Court of Appeals for the Tenth Supreme Judicial District of Texas, at Waco, hereby certify that the foregoing 11 page(s) contain(s) a true and correct copy of the Opinion filed in said Court on the 3rd day of June, 1982, in the following numbered and entitled cause, to wit:

HENRY WASHINGTON ERWIN, III,

Appellant

No. 10-81-001-CR

THE STATE OF TEXAS,

Appellee

on appeal to said Court from McLennan County, Texas.

GIVEN UNDER MY HAND AND SEAL OF SAID COURT, at office in Waco, this the 3rd day of June, 1982.

/s/ ROBERT G. WATTS, Clerk

## APPENDIX B

COURT OF CRIMINAL APPEALS OF TEXAS
CLERK'S OFFICE
Austin, Texas

September 22, 1982

I have been instructed to advise that the Court has this day refused the Appellant's petition for discretionary review in Cause No. 0565-82, ERWIN, HENRY W. III

10-81-001

Sincerely yours,

THOMAS LOWE, Clerk

## APPENDIX C

COURT OF CRIMINAL APPEALS OF TEXAS
CLERK'S OFFICE
Austin, Texas

October 20, 1982

I have been instructed to advise that the Court has this day denied the Motion for Rehearing on the Appellant's petition for discretionary review in Cause No. 0565-82, ERWIN, HENRY W. III

10-81-001

Sincerely yours,

THOMAS LOWE, Clerk

Supreme Court, U.S.
FILED
MAR 16 1983
ALEXANDER L. STEVAS
CLERK

NO. 82-1049

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

HENRY WASHINGTON ERWIN, III,
*Petitioner*

V.

THE STATE OF TEXAS,
*Respondent*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS FOR THE TENTH
SUPREME JUDICIAL DISTRICT, WACO, TEXAS

# RESPONDENT'S MEMORANDUM OPPOSING CERTIORARI

JIM MATTOX
Attorney General of Texas

DOUGLAS M. BECKER
Assistant Attorney General

GILBERT J. PENA
Assistant Attorney General
Chief, Enforcement Division

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

*ATTORNEYS FOR RESPONDENT*

NO. 82-1049

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

HENRY WASHINGTON ERWIN, III,
*Petitioner*

V.

THE STATE OF TEXAS,
*Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE TENTH SUPREME JUDICIAL DISTRICT, WACO, TEXAS

# RESPONDENT'S MEMORANDUM OPPOSING CERTIORARI

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES Jim Mattox, Attorney General of Texas, attorney for Respondent, and submits this his Memorandum Opposing Certiorari:

## I.

The sole question presented by Petitioner is whether his judgment of conviction of conspiracy to engage in organized criminal activity under Tex. Penal Code Ann. §71.02(a)(5), should be reversed because the evidence at

his trial was insufficient.* This question is a plainly insubstantial one that does not merit plenary review by this Court. In its opinion affirming the judgment of conviction, the Tenth Supreme Judicial District of Texas summarized the evidence, which came from more than thirty witnesses and eighty-two exhibits introduced by the state alone, at great length. (Appendix A to the Petition at 1-8). The court concluded that there was sufficient evidence to show that Petitioner entered into the alleged combination with the intent to possess and import marijuana:

> "Viewed in a light most favorable to the verdict, we find that there was sufficient evidence to show such intent considering the following: the size of the plane and the expense of operating it; the modifications that were made for long distance flights; the illegal flights; the number of people involved; the use of aliases by co-conspirators; Harris' express declaration to Banks that the plane was to be used to 'run a load'; Appellant's denial that he knew Baldi and his lying about his passport; the sham corporation; payments in cash of large sums; the ties to Columbia."

(Appendix A to the Petition at 6).

---

* Petitioner also urges that appellate affirmance of his conviction upon insufficient evidence shows that the underlying statute is unconstitutionally vague and indefinite. Plainly this is not a contention that the statute is facially invalid, a contention that was never raised in the court below. It is merely a variation on the theme that Petitioner was convicted upon insufficient evidence under *Jackson v. Virginia*, 443 U.S. 307 (1979).

Similarly, the court concluded that the evidence was sufficient to show that Petitioner had acted intentionally:

> "Evidence which showed Appellant's knowledge includes the following: he made several illegal flights and attempted to make other illegal flights; he saw tanks for extra fuel had been installed; he insisted in installing a new fuel pump; he rented the Austin apartment using an alias; he exited the U.S. in an unairworthy plane; he denied knowing Baldi; he lied about his passport."

(Appendix A to the Petition at 8).

Petitioner's argument amounts to a complaint that a rational trier of fact could not reasonably have found him guilty upon this state of the evidence.

## II.

Plainly Petitioner fails to present a substantial federal question. He argues in effect that the outcome of his case should have been different under *Jackson v. Virginia*, 443 U.S. 307 (1979), but advocates no alteration of the standard of review set forth in *Jackson v. Virginia*. Instead, he complains of its routine and unexceptional application in his case. He sets forth no conflicting case from any jurisdiction. Accordingly, there are no "special and important reasons" for granting review in this case. S.Ct.R. 17.

Therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

GILBERT J. PENA
Assistant Attorney General
Chief, Enforcement Division

DOUGLAS M. BECKER
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

*Attorneys for Respondent*

January ____, 1983.

## PROOF OF SERVICE

I, Douglas M. Becker, Assistant Attorney General of Texas, do hereby certify that on the ____ day of January, 1983, three copies of the Memorandum Opposing Certiorari were mailed, postage prepaid, to Mr. Paul E. Gartner, 500 Citizens Tower, Waco, Texas 76701, and to Mr. Joseph (Sib) Abraham, Jr., and Mr. Charles Louis Roberts, Attorneys at Law, P.O. Box D, El Paso, Texas 79951-0004. All parties required to be served have been served. I am a member of the Bar of this Court.

DOUGLAS M. BECKER
Assistant Attorney General
Attorney for Respondent

SUBSCRIBED AND SWORN to before me this _____ day of January, 1983.

NOTARY PUBLIC in and for
Travis County, Texas